

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
ERCHONIA CORPORATION, f/k/a Therapy Products, Inc., Plaintiff, : 07 Civ. 8696
: (DLC)
-v- :
: MEMORANDUM OPINION
LIONEL BISSOON, M.D., d/b/a MESOTHERAPIE & ESTETIK, MERIDIAN :
AMERICA MEDICALS, INC., MERIDIAN :
MEDICAL INC., and MERIDIAN CO., LTD., Defendants. :
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Appearances:

For the plaintiff:
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-and-
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For the defendants:
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DENISE COTE, District Judge:

In a Report and Recommendation ("Report") dated March 31, 2010, the Honorable Theodore H. Katz has recommended awarding defendants Lionel Bissoon, M.D., Meridian America Medicals,

Inc., Meridian Medical, Inc., and Meridian Co., Ltd. (together, "Meridian") attorneys' fees in the amount of \$505,656.33 and costs in the amount of \$35,881.62. Plaintiff Erchonia Corporation ("Erchonia") filed objections to the Report on April 19, 2010, and Meridian filed a response on April 29. For the following reasons, Judge Katz's thorough and well-reasoned Report is adopted in full.

BACKGROUND

Erchonia filed suit against Meridian on October 9, 2007, alleging (1) false designation of origin, false description and false advertising under § 43(a) of the Lanham Act; (2) common law trademark infringement, passing off, and unfair competition; and (3) trademark dilution, blurring and tarnishment under New York law. On June 1, 2009, the Court granted summary judgment to Meridian on all claims. Therapy Products, Inc. v. Bissoon, 623 F. Supp. 2d 485, 497 (S.D.N.Y. 2009). By Opinion and Order dated August 26, 2009, the Court granted in part Meridian's motion for attorneys' fees: fees and costs were granted for "all discovery and summary judgment practice associated with Erchonia's trademark infringement claims" and denied for the false advertising claim. Therapy Products, Inc. v. Bissoon, No. 07 Civ. 8696 (DLC), 2009 WL 2709279, at *3 (S.D.N.Y. Aug. 26, 2009) ("August Opinion"). The case was referred to the Magistrate Judge for an inquest on Meridian's fees and costs.

The underlying facts are set forth in detail in these prior Opinions and in the Report.

DISCUSSION

The court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). When specific objections are made, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997). To accept those portions of the report to which no timely objection has been made, "a district court need only satisfy itself that there is no clear error on the face of the record." King v. Greiner, No. 02 Civ. 5810 (DLC), 2009 WL 2001439, at *4 (S.D.N.Y. July 8, 2009) (citation omitted).

The Report examined the fees charged by Meridian's counsel and determined that they were reasonable. The fees are commensurate with the fees charged by New York attorneys with comparable experience and have been approved in other intellectual property cases. This finding is well supported in the Report and is not challenged by Erchonia.

The Report next examined the hours expended by Meridian's counsel on this litigation and found that it had made a presumptively reasonable request for compensation. In its

application for an award of attorneys' fees, Meridian restricted itself to the period from January 2008 through March 2009 (the "Period"), a time during which almost all of the work was devoted to Erchonia's trademark claims. Meridian asserts that it spent approximately 1640 hours in defending this lawsuit during the Period, excluding time that Fish & Richardson determined was not spent on the trademark infringement claims.¹ During the Period, Meridian drafted and responded to discovery requests, conducted its factual investigation, located witnesses, participated in ten depositions, attended conferences, and briefed the summary judgment motion. As noted in the Report, the hours expended during the Period were increased because of the extra burdens imposed by Erchonia on Meridian. For example, Meridian was required to travel to Texas to inspect Erchonia documents and had to retake a deposition of an ill-prepared Erchonia witness. The Report's conclusion that the hours expended during the Period were presumptively reasonable is well-supported and adopted.

Erchonia makes a single objection to this finding of reasonableness. It points out that Meridian did not show that it actually paid the bills submitted by its counsel. The Second Circuit Court of Appeals has opined that "the actual billing arrangement is a significant, though not necessarily

¹ The total number of hours was approximately 1933.

controlling, factor" in determining a reasonable fee. Crescent Publ'g Group, Inc. v. Playboy Enters., Inc., 246 F.3d 142, 151 (2d Cir. 2001). The court has not, however, declared "a per se rule that the actual billing arrangement places a ceiling on the amount the prevailing party can recover . . . especially in light of the district courts' broad discretion in awarding fees." Id.

In support of its application for a fee award, Meridian submitted the bills it received from its counsel, bills that were issued monthly and contemporaneously with the work as it was performed. None of the bills reflects that any amount billed in a prior month remained due and owing. Given that both the hourly rate and the amount of time expended on legal work during the Period are reasonable, the absence of a separate representation from Meridian that it actually paid its billed attorneys' fees in full is insufficient to undermine a finding that the entire billed amount is a reasonable basis from which to build an award of fees in this case.

In the third and final step of its analysis of the request for an award of attorneys' fees and costs, the Report determined that Meridian was entitled to recover 69% of the fees and costs incurred for work performed during the Period. The total amount of fees and costs incurred during the Period was roughly \$790,000. Meridian adjusted this figure by removing roughly 19%

of it as unrelated to the trademark claims, and 15% of the remaining amount to ensure that the requested amount was indeed reasonable and to eliminate the need for a line by line examination of the billing records. Meridian therefore sought an award of roughly \$506,000 in attorneys' fees and \$37,000 in costs, for a total of \$542,308.08. The Report adopted this request in full, finding Meridian's approach to be "well-reasoned, fair, and fully supported." The Report concluded that "[e]liminating 31% of the work performed, for purposes of the fee application, more than adequately accounts for the work performed on the non-trademark issues." The Report's conclusion is adopted in full.

Erchonia makes three interrelated objections to this portion to the Report. It argues that it is unreasonable to conclude that "almost all work" performed during the Period was related to the trademark claims when an examination of the depositions, documents and briefs from the Period would produce a more "objective" measure of the importance of the false advertising issues to the work performed during the Period. Erchonia characterizes the 31% reduction in the fee request as "modest" and "arbitrary." Second, Erchonia argues that the advertising evidence produced in discovery reflects more time expended on the false advertising claims than can be attributed to a "modest 15%" reduction. Finally, in an argument that in

fact supports the Report, Erchonia concedes that Meridian did not focus on the false advertising claim "until late in the case," even though Erchonia was actively pursuing it.

These three objections can be swiftly rejected. Reducing the fee request by 31% is not a modest reduction and does not represent a judgment that "almost all" of the work performed during the Period related to the trademark claims. As detailed in the Report, however, and as is confirmed by this Court's supervision of the litigation and finding in the August Opinion, the false advertising claim played only a minor role in this litigation. It accounted for far less than 31% of the effort expended by counsel during the Period. Indeed, if it were necessary to estimate the amount of effort that was expended by Meridian during the Period on the false advertising claim, that estimate would be in the neighborhood of 10%, and certainly not more than 15%. This is in fact confirmed by Erchonia's concession that Meridian did not even focus on the false advertising claim until near the end of the case.

Finally, the two across-the-board reductions are arbitrary, but that does not mean that they result in a request that is unreasonable. Indeed, Erchonia had an opportunity to, but did not, do a line-by-line analysis and show why a reduction of 31% is insufficient to eliminate any recovery for work on the false advertising claim. While Erchonia offered a quasi-statistical

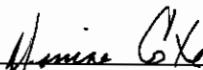
analysis based on the number of pages devoted to certain subjects in deposition transcripts, briefs, and documents produced in discovery, as explained in the Report, that page count is not a reliable basis for calculating a fee. A court has discretion to impose an across-the-board reduction in fees.

See Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 172-73 (2d Cir. 1998). Two blanket reductions -- that result in an overall payment of 69% of the total fees incurred -- represent an extremely generous reduction for work performed on the false advertising claim and a very conservative approximation of the portion of the work performed during the Period that is attributable to Erchonia's trademark infringement claims.

CONCLUSION

Erchonia's objections to the Report are denied following a de novo review of Meridian's request for attorneys' fees. Attorneys' fees are awarded in the amount of \$505,656.33 and costs are awarded in the amount of \$35,881.62. The Clerk of Court shall close the case.

Dated: New York, New York
June 15, 2010



DENISE COTE
United States District Judge